

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

FREEDOM FROM RELIGION FOUNDATION, INC., STEPHEN MEHOLIC, DAVID SIMPSON, JOHN BERRY, and CANDACE WINKLER,	.	Case No. 16-04504-egs
Plaintiffs,	.	
vs.	.	U.S. Courthouse
COUNTY OF LEHIGH,	.	601 Market Street
	.	Philadelphia, PA 19106
Defendant.	.	Tuesday, June 13, 2017
	.	9:28 a.m.
*****	.	

TRANSCRIPT OF ORAL ARGUMENT ON MOTION FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE EDWARD G. SMITH
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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1 THE CLERK: All rise. United States District Court
2 for the Eastern District of Pennsylvania is now in session, the
3 Honorable Edward G. Smith presiding.

4 THE COURT: Good morning, you may be seated. Thank
5 you.

6 MR. CAFFREY: Morning, Judge.

7 MR. SCHNEIDER: Morning, Your Honor.

8 THE COURT: The Court is called to order in the
9 matter of Freedom from Religion Foundation, Inc., Stephen
10 Meholic, David Simpson, John Berry, Candace Winkler v. the
11 County of Lehigh. This is civil action number 16-4504. The
12 Court convenes today to hear oral argument with respect to the
13 cross-motions for summary judgment that have been filed by the
14 plaintiffs and the defendant. Present in the courtroom on
15 behalf of the plaintiffs is actually Marcus Schneider.

16 Good morning, sir.

17 Mr. SCHNEIDER: Good morning, Your Honor.

18 THE COURT: And on behalf of the County of Lehigh,
19 Mr. Tom Caffrey. Good morning.

20 MR. CAFFREY: Good morning, Judge.

21 THE COURT: Counsel, I want to remark on how
22 outstanding your written submissions have been, and I do
23 appreciate that.

24 Mr. Schneider, are you prepared to argue?

25 MR. SCHNEIDER: I am, Your Honor.

1 THE COURT: Very well, sir. You may proceed.

2 MR. SCHNEIDER: Would you like me at the podium, Your
3 Honor?

4 THE COURT: Wherever you're most comfortable.

5 MR. SCHNEIDER: May it please the Court, Mark
6 Schneider on behalf of the plaintiffs, the individual
7 plaintiffs, and Freedom from Religion Foundation. Your Honor,
8 the parties do not disagree that the Lemon tests and
9 endorsement tests govern the outcome of this case. The issue
10 presented under the endorsement test is whether a present-day
11 county seal featuring a prominent Latin cross violates the
12 Establishment Clause of the First Amendment. And if we unpack
13 that very concise issue statement, we really get to the heart
14 of the features of this case, which compel the conclusion that
15 this seal is unconstitutional.

16 And we have to begin, I believe, with the Latin cross
17 itself, which the county itself agrees is a -- is the
18 preeminent symbol of Christianity. And it is the
19 representation of the crucifixion and resurrection of Jesus
20 Christ at the heart of Christianity and is unique in that it is
21 more singularly religious than some of the other symbols that
22 have been challenged under the Establishment Clause over the
23 years of the Establishment Clause jurisprudence that governs
24 this case. It's different than the Ten Commandments, which
25 courts have consistently remarked has some secular history in

1 our country. It's different than a crèche in a holiday
2 display, which has obvious holiday significance. It's
3 different than the sort of ceremonial deism uses of the word
4 "god" that we have seen before the Supreme Court. It is
5 singularly religious, and it has not been susceptible to
6 secularization in the way that those other symbols have.

7 And so to return to that concise issue statement, a
8 prominent Latin cross on a county seal, we also have to talk
9 about the prominence of the cross in this seal. It is
10 centrally located in the seal. It is the largest symbol on the
11 seal. And in the original design, the design which is still
12 used -- the color scheme, anyway, is still used on the flag of
13 the county today. It's a blazing canary yellow standing out
14 among all the other symbols at the center of the seal itself.
15 And so that prominence, in conjunction with the singularly
16 religious meaning of the cross, make this case very unique in
17 comparison with other cases that the Third Circuit has heard.

18 And the final piece in sort of unpacking that concise
19 issue statement of a prominence Latin cross on a county seal is
20 the county seal aspect of this case, which was perhaps the most
21 striking difference in the briefs submitted by the parties.
22 From the plaintiffs' standpoint, the fact that this is on a
23 county seal makes it quite different from cases involving a
24 singular monument standing for decades in the same place, or
25 the plaque at issue in the Freethought Society case heavily

1 relied upon by the defendants. This is the symbol of the local
2 government, and it has been used as that symbol and is still
3 being used as that symbol today. So there's no disconnect.
4 There can be no implied distance between whatever meaning the
5 Court determines this seal has to the reasonable observer and
6 the government itself, the local government itself.

7 THE COURT: And why do you think -- if you were to
8 poll the residents of Lehigh County, why do you think almost
9 none of them would know what was on their seal when it's so
10 prominently displayed? It's on, I guess, on government
11 vehicles, police cars, on flags. Why would it be that so few
12 residents would have any idea what was on their seal?

13 MR. SCHNEIDER: Well, Your Honor, I guess I don't
14 know that it's necessarily the case on the record in this case
15 that it isn't well known in the community. But I know that --
16 and frankly, my interactions have been limited to the
17 individual plaintiffs. And I know, you know, for them, it has
18 been quite prominent, and, you know, I think that one of the
19 plaintiffs remarked that he had just seen it on a t-shirt at a
20 store down the street on the day of his deposition. So, you
21 know, for individuals who feel that this is an important issue,
22 I think it's quite prominent, and I think --

23 THE COURT: That's from 1944 to today. Are you aware
24 of any other issues that have come up with respect to the seal
25 before this case?

1 MR. SCHNEIDER: The record does not reveal that there
2 have been any other issues. The designee, the opponent for the
3 county, was able to remark that certainly during his time,
4 nothing had come up and that he was unaware of anything prior.
5 But obviously we are dealing with a large amount of time. But
6 you know, I don't -- certainly, as plaintiffs with the burden
7 in this case, we have not uncovered evidence that there has
8 been prior controversy here. But I think it's important to
9 note that -- and this gets at one of the defendant's argument
10 -- that the Third Circuit has specifically rejected the idea
11 that passage of time alone has a sanitizing effect on --

12 THE COURT: Right.

13 MR. SCHNEIDER: -- otherwise religious displays. And
14 I think -- and that stems from Justice O'Connor's opinion in
15 Lynch v. Allegheny, and recognizing the sort of trouble that we
16 might find ourselves in if history -- if passage of time alone
17 were sufficient to secularize otherwise religious symbols or,
18 as an example, sanitize, perhaps, discriminatory symbols over
19 the years, any other effect like that.

20 So the passage of time here I think is merely one
21 piece to the puzzle. And I guess when you take a display that
22 features that prominent Latin cross on such an identifiable
23 government symbol, we take the position that the County has a
24 real uphill battle in -- and the County's correct in observing,
25 and I think we also observed that the reasonable observer

1 considers this display with the history and context of the
2 display in mind. But I believe that facially, with such a
3 prominent, singularly religious symbol on a county seal, the
4 County has an uphill battle to show that the history and
5 context somehow secularizes --

6 THE COURT: So you would agree that the analysis is
7 somewhat different if we have a flag that was designed and
8 created or a seal that was designed and created in 1944 versus
9 if Lehigh County were trying to do this today.

10 MR. SCHNEIDER: I think it's safe to say that it is
11 more complicated because it presents the opportunity for being
12 different.

13 THE COURT: And otherwise, if it were being done
14 right now, your case would be extremely strong, if it isn't
15 already strong. But if, right now, you're protesting or
16 objecting to the County passing a seal that has this huge cross
17 in 2017, that would be an incredibly uphill battle for the
18 County.

19 MR. SCHNEIDER: I think so, and I think that the
20 primary difference would -- and I guess what I want to avoid is
21 I don't know that we're dealing with a situation that much
22 different than that because I don't know that the 70 years has
23 supplied a lot of context that would change the meaning. So
24 it's certainly the case that, without there being any
25 possibility of history and context to change the meaning of the

1 cross, it would be stronger in that sense. But I want to be
2 careful to say that I don't think the 70 years that has passed
3 here has really supplied much in the way of context that would
4 change the meaning, as if it were adopted today. And I think
5 that other than the passage of time, we really don't -- there's
6 really no evidence pointed to by the County to show any clearly
7 identifiable secular meaning that the seal or the cross has
8 come to possess over time.

9 THE COURT: Now, what about effect? There was
10 nothing in the record, really, to focus on effect. One of our
11 concerns, of course, under the First Amendment is that there be
12 no establishment of religion by the government. Is there any
13 evidence that, from 1944 to now, that this seal has in fact
14 helped to establish, preserve, and in any way assist the
15 Christian religion over any other religion? Do we have more --
16 a higher percentage of Christians today in Lehigh County than
17 we had in 1944? Anything about effect? Do you think that has
18 any purpose to this analysis?

19 MR. SCHNEIDER: I don't think that there -- we've
20 uncovered any outward effects. Certainly, I think what's hard
21 to capture is one of the plaintiffs, Mr. Simpson, testified
22 that he has just sort of a general uneasiness about the
23 possibility that he, as an atheist, may need to call upon the
24 government, and if it's known that he doesn't subscribe to the
25 Christian religion, he may face consequences. And so to the

1 extent that that may have had a chilling effect on any number
2 of individuals over the years, I don't think there would be
3 outward evidence of that.

4 THE COURT: That raises even another question. Is
5 there any reason to believe there are more Christians in the
6 government today than there were in 1944 or that somehow this
7 -- the government has been unduly biased in favor of religion
8 -- in favor of Christianity because of the seal or that, in
9 fact, the seal results from this bias?

10 MR. SCHNEIDER: Certainly not in the record, Your
11 Honor. I know Mr. Meholic provided testimony in his deposition
12 that one of the things he did when -- he actually brought this
13 matter to the County's attention prior to the involvement from
14 the Freedom from Religion Foundation, and for him, some of his
15 research that led him to do that was the recent census and the
16 information contained that reflected that Christians were not a
17 significant majority in the county. And he felt that to the
18 extent that at one time the symbol may have represented a
19 majority of the county, that that's certainly no longer the
20 case.

21 THE COURT: Now, wouldn't that have really been
22 something for a legislative decision as opposed to a judicial
23 decision? If, in fact, the people of Lehigh County no longer
24 like the cross on their seal because they're no longer
25 Christian, couldn't they just do that through the elective

1 process and through their legislature?

2 MR. SCHNEIDER: Sure, sure. I think that they could.
3 But I don't think that that encroaches upon the individual
4 rights of these particular plaintiffs from seeking to have a
5 symbol that they find to be, you know, offensive and harmful to
6 them in an important spiritual way that the courts have
7 consistently recognized. I don't think it offends their
8 ability to be able to seek relief on that basis on an
9 individual claim. And I guess the other feature that I haven't
10 yet talked about regarding the history and context that is
11 important to note is that the statements of the creator of this
12 seal disclosed that, unsurprisingly, the cross was used to
13 signify Christianity and, I believe, the -- what he phrased as
14 the people who represent the backbone of Lehigh County.

15 THE COURT: Right.

16 MR. SCHNEIDER: And so if the County has an uphill
17 battle and the first bit of history that we find supports that
18 the original creator of this display, who was one of the three
19 commissioners to vote to approve the display, specifically used
20 the cross to signify Christianity, I think it makes that,
21 again, an even steeper hill to climb. And if -- we've talked a
22 little bit about the passage of time and how that alone is not
23 enough. Really, the only other argument presented by the
24 County is that these other symbols on the seal have somehow had
25 secularizing effect upon the cross itself. And I think there

1 are a few problems with that argument, the first of which is
2 it's actually contrary to the statements of the creator of the
3 seal. So to the extent that the other symbols he put on the
4 seal would change his desired purpose for the cross being on
5 the seal, it would be unintended and accidental, if that were
6 to happen. And the other important feature is that there's no
7 evidence to suggest that -- what the secular meaning is that
8 the cross may have acquired over the years, what effect these
9 other symbols may have had upon the cross. Certainly --

10 THE COURT: But do you think the average -- and I
11 agree with you in what you said before about the symbol, and I
12 do want to talk to you a little bit more about that -- but this
13 is a unique symbol of Christianity. It is known worldwide.
14 Everybody knows it's kind of like the red cross on an emergency
15 vehicle or helicopter. It's known worldwide, and everybody
16 knows what that stands for. They know it stands for
17 Christianity.

18 Now, what that means to them, you know, obviously,
19 that can be different depending on the views of various people.
20 But even though it is that symbol, the symbol is subject to the
21 interpretation of individual people. Things like the nativity
22 scene or the Ten Commandments, those are actual words, or even
23 "In God we trust." Now "In God we trust" less so, but those
24 are actual things from the Bible, and you kind of crossed over
25 and said this stands as much worse from a constitutional

1 standpoint because it's such an almost simple symbol. It is
2 just a symbol, and that symbol has such meaning. But does that
3 symbol have more meaning than the Ten Commandments when it's
4 just a symbol or does that symbol have more meaning than a
5 nativity scene, which is about the birth of Christ, and there's
6 no way you can argue it's not about the birth of Christ.

7 MR. SCHNEIDER: Uh-huh.

8 THE COURT: How do you -- why do you make that
9 determination that you believe this symbol, standing alone with
10 no words, *et cetera*, which I concede is known worldwide, almost
11 nobody you will run into, at least as an adult, will not know
12 what that symbol stands for.

13 MR. SCHNEIDER: Well, I think -- I would agree that
14 it is more abstract in its meaning, and it's less specific than
15 the Ten Commandments, it's less specific than a nativity scene.
16 However, it does not have any secondary secular meaning in the
17 way that those symbols might.

18 The Ten Commandments, courts have consistently
19 recognized a secular role in the creation of laws in our
20 country. And the crèche, or the nativity scene, has a holiday
21 significance, a secular holiday significance, that -- and it's
22 important to note on that symbol that that is one symbol where
23 the full context has been very important. A standalone
24 nativity scene may be problematic whereas a display in
25 conjunction with many other holiday symbols would suggest

1 perhaps a more secular holiday purpose.

2 But with respect to the cross, there is no secondary
3 secular meaning that has been routinely identified by the
4 courts in the way that there have with these other symbols, and
5 frankly, there's no -- at least that I can see -- there's no
6 secondary secular meaning pointed to by the county. I don't
7 know what the symbol is to stand for other than Christianity.

8 And so while it is not as specific a part of
9 Christianity, perhaps, as the Ten Commandments and the words
10 written in the Ten Commandments, it's certainly a symbol of the
11 religion itself, and I think fairly safe to say it's a symbol
12 of the crucifixion and resurrection of Jesus. And so those
13 components of that religion have not -- there's no secondary
14 secular meaning I think is important.

15 And I guess the other feature of this case that
16 contrasts the symbol with those other contexts is, again, that
17 this is on the seal in numerous places, and in many of the
18 contexts displayed year-round, where the seasonal displays in
19 holiday cases have been significant in the fact that the
20 displays have been seasonal. And in a lot of Ten Commandments
21 cases, in a singular location, you've seen sort of historical
22 landmark type of argument. And this really doesn't have those
23 features because it's still being placed in new locations
24 today.

25 And so I guess the other issue that I wanted to touch

1 on is to the extent that there's a claim that the secular
2 meaning acquired is to honor the settlers of the county, to the
3 extent that that's a contention being made, there's really no
4 evidence to support that. I mean, that may well be the modern
5 reading of the words of Mr. Hertzog that designed the seal by
6 the commissioners today. It's not supported by those words.

7 I'm not saying they can't read it in that way, but
8 there is really a lack of evidence to support that meaning.
9 And I think what's significant is there's also a lack of
10 evidence to suggest that the settlers were Christian, that a
11 cross would fairly represent those settlers, that there is not
12 another symbol to represent the settlers of the county that's
13 not such a blatantly religious symbol. There's really nothing
14 about the cross itself that connects with settlers of the
15 county. It's just the symbol of Christianity. And so to the
16 extent that some point, over time, it has acquired a secondary
17 meaning, I struggle to see how the evidence supports that
18 contention.

19 THE COURT: Well, but you don't believe that they've
20 maintained this cross in order to maintain that Christianity is
21 the religion of Lehigh County.

22 MR. SCHNEIDER: Well --

23 THE COURT: Is there anything in the record to
24 suggest that today's commissioners believe Christianity is the
25 religion of Lehigh County?

1 MR. SCHNEIDER: I think the problem is the record is
 2 really devoid of support for the stated position of the County.
 3 I mean, the county has, in many respects, legitimized the
 4 importance and the meaning of Mr. Herzog's comments by saying,
 5 that's what we look to to say, you know, what does this mean.
 6 And the County's argument seems to be that because they
 7 interpreted it to have a secular meaning, the vote to keep the
 8 seal necessarily has a secular meaning, as well.

9 But the problem with reading Mr. Herzog's words to
 10 suggest that the cross is there for a secular purpose is that
 11 it essentially requires accepting his statements on 14 or 15
 12 symbols and rejecting just one, which happens to be at the
 13 heart of this litigation. And so, you know, I think that --
 14 the Court's question is precisely why, in McCreary County, the
 15 Supreme Court reemphasized that even the purpose analysis is an
 16 objective one, where a reasonable observer or an objective
 17 observer considers all the circumstances and asks --

18 THE COURT: But hasn't the Third Circuit more or less
 19 interpreted that more as a subjective standard?

20 MR. SCHNEIDER: Well, Your Honor, Freethought Society
 21 and Modrovich are the cases that kind of delved into that, and
 22 both of those cases occurred prior to McCreary County, which
 23 was a 2005 case before the Supreme Court. And so to the extent
 24 that they nod in that direction, I think that McCreary has --
 25 should be read to have the effect of kind of resetting that

1 analysis towards a more objective view. And it's certainly an
2 objective view of the subjective statements of the county.

3 THE COURT: Now, what if the subjective statements of
4 the county today are, we didn't want to change the seal because
5 it is our historical seal, put into place in 1944. I suppose
6 your suggestion would be that it was unconstitutional in 1944.

7 Is that correct?

8 MR. SCHNEIDER: Correct.

9 THE COURT: As opposed to the law has evolved, that
10 morality has evolved, the Constitution has evolved, and the
11 interpretation of it. But it's your position it was
12 unconstitutional in 1944. But suppose today the people that
13 are voting on keeping it are saying, we're keeping it because
14 it's our historical seal, it represents our history, it was put
15 into place in 1944, it's been the flag, it's been the seal for
16 the people of Lehigh County and the citizens from 1944 to 2017,
17 that's why we kept it in place. How would you respond to that?

18 MR. SCHNEIDER: Well, I think that that really boils
19 down to being nothing more than a passage of time argument from
20 a legal standpoint.

21 THE COURT: Right.

22 MR. SCHNEIDER: I mean, and the commissioners aren't
23 attorneys, and they're not looking at it in the way that we are
24 here. But, you know, to the extent that it's preserving
25 something that has just been around for a long time -- and it

1 has -- I mean, that can't be disputed. I think that amounts,
2 legally, to nothing more than suggesting that somehow it's
3 grandfathered in because it's been around for a long time. And
4 I think it would be different if, in conjunction with making
5 that claim, the county could point to some secular meaning.
6 And in our briefs we made a point to cover the seal cases in
7 the Tenth and Seventh Circuit that found seals containing a
8 cross to be permissible.

9 There are two of them, and they have very unique
10 histories, very unique facts surrounding a secular meaning to
11 the seal in those situations, one being a family crest, and the
12 other being sort of a part of the naming of the city itself.
13 And so I think the contention that this is part of our history
14 would be different if there were some facts to suggest that
15 Christianity has some unique place in the history of Lehigh
16 County. And we really don't have that. So absent that, what
17 you're left with is even if you stripped away the Christian
18 meaning of the cross, the cross has to represent religion.

19 And the problem with maintaining this from a
20 historical standpoint is it places religion among the other
21 important features and aspects of the county to be celebrated
22 in this seal. And so even if you avoid the sectarian issues
23 of, you know, promoting Christianity versus other religions,
24 what about the individuals, like some of the plaintiffs, who
25 are non-religious? Just very simply at a very broad level are

1 non-religious, living in a county where religion is celebrated,
2 even if at that general a level.

3 THE COURT: But what they can't get around is that
4 this seal has, or was, is part of the history of the county
5 they're living in. It's been there since 1944. So I could see
6 being concerned about something being done today, and you could
7 argue what's being done today is the continuation of that seal.
8 But there's no way, whether you're an atheist, whether you're
9 religious, whether you're a Jew, whatever you are, you can't
10 get around the fact that, in 1944, this is what the
11 commissioners voted as the seal, and that is now the history of
12 Lehigh County, includes having this seal since 1944.

13 MR. SCHNEIDER: And again, I think what that comes
14 down to from a legal standpoint is the inability of just the
15 passage of time to secularize that.

16 THE COURT: Right.

17 MR. SCHNEIDER: And I guess just as a final note on
18 that topic, the --

19 THE COURT: How is "In God We Trust" secularized?

20 MR. SCHNEIDER: Well, the reasoning of the court is
21 that it has taken on a meaning of legitimizing currency and
22 that it has performed the important role of showing that
23 particular currency is --

24 THE COURT: Well, wouldn't the plaintiffs be even
25 more upset by the fact that every time they pull out a currency

1 of the United States, the word "God" is right there and that
2 not just the word "God," but we trust God?

3 MR. SCHNEIDER: I think if they were here, Your
4 Honor, I think they probably would. I think they probably
5 would, and you know, that ground has sort of been covered, and
6 that's not a challenge that's right for them to take on, given
7 how that's been decided. But I think in this particular
8 situation on the local government level, there can really be no
9 greater symbol of that local government than the county seal,
10 which is, again, as we've talked about, still being used today.

11 And so each new use is somewhat unique from -- in
12 terms of distinguishing and separating this case from
13 longstanding singular displays. And so from the standpoint of
14 the individual plaintiffs, each time that the seal is used
15 today, it really is carrying that originally intended message
16 from the original creator of the seal. And so from their
17 perspective, and we think from the perspective of a reasonable
18 observer, the passage of time alone hasn't changed that.

19 THE COURT: Okay.

20 MR. SCHNEIDER: Thank you, Your Honor.

21 THE COURT: Thank you very much, sir.

22 And Mr. Caffrey, you would agree that the seal is
23 large, prominent, and over the courthouse?

24 MR. CAFFREY: Judge, in one of the cases, the court
25 describes the Latin cross as an inherently religious symbol,

1 and it notes that we're the masters of the obvious. Of course
2 it's an inherently religious symbol, and the county certainly
3 does not dispute that. The county does not dispute that the
4 cross is canary yellow and with a blue background -- at least
5 for purposes of the flag. The seal in other aspects does not
6 appear in the same type of display.

7 Now, Judge, I'll start out my presentation with
8 something which you noted in response to Mr. Schneider's
9 presentation, and that is if the county, in 2017, decided to
10 adopt a new seal that looked like the seal that was adopted in
11 1944, I think there would be little question that that seal
12 would be unconstitutional because it would be readily apparent
13 that the purpose of adopting this type of seal within the
14 context of this day and age would be solely for the purpose of
15 advancing religion. And I think that's an important principle
16 to focus on because what the Third Circuit made clear in
17 Freethought and Modrovich was that although the court needs to
18 look at the purpose why a religious symbol was initially
19 adopted or approved, the focus should be on why a government
20 entity is now refusing to remove that religious symbol upon
21 request of an interested citizen.

22 So if we go back to 1944, when this seal was
23 originally adopted, there's nothing in the official minutes
24 which indicate why the seal included a Latin cross. However,
25 we do know that an article was written about two years later by

1 one of the commissioners who approved that seal and, by all
2 means that we know, was the person who actually designed the
3 seal. That's what the article indicates. I have no reason to
4 dispute that. And Mr. Hertzog, the commissioner that I'm
5 referring to, writes the article for the Lehigh County
6 Historical Society, and he indicates quite clearly that the
7 purpose of the cross was to honor Christianity.

8 We have no reason to refute what Mr. Hertzog wrote in
9 1946. And I think perhaps that plaintiffs have misinterpreted
10 what the County has said in 2015. I believe the plaintiffs are
11 arguing that, in 2015, the board of commissioners attempted to
12 reinterpret or re-characterize what Mr. Hertzog said in 1946,
13 and I don't interpret what the board of commissioners stated in
14 2015 in that way. And in fact that's why I submitted an
15 affidavit for Mr. Osborne in an attempt to clarify the record.

16 And I think what Mr. Osborne indicates in that
17 affidavit is reflective of what the board of commissioners did
18 in 2015, and that is not that they said, Mr. Hertzog, we know
19 that you said that the Latin cross signifies Christianity, but
20 we're going to re-characterize what you said. The language in
21 that article speaks for itself. It appears that that cross was
22 put on the seal for the purpose of honoring Christianity. I'm
23 not here to dispute that. I'm not here to re-characterize what
24 Mr. Hertzog said in 1946. And if your focus today in
25 evaluating this case was solely on what happened in 1944, well,

1 the county would be hard-pressed to defend itself.

2 But I think, again as the Third Circuit noted, the
3 focus is on, well, why did the commissioners refuse to remove
4 that seal when it was challenged as being unconstitutional?
5 And I think Mr. Osborne's affidavit clarifies, clearly, why the
6 board of commissioners refused to remove that seal. They
7 looked at the only information that was available at the time
8 and is still the only information available, and that is,
9 again, the article written by Mr. Hertzog.

10 Mr. Hertzog's article of course not only mentions the
11 cross, it mentions, at my count, 15 other symbols on that seal.
12 The industrial buildings, the farm buildings, the cow, the
13 bunting, signifying clothing manufacturing in Lehigh County --
14 all of those clearly secular symbols on the seal must be looked
15 at in conjunction with the cross. And I think what the board
16 of commissioners decided in 2015 is that we know what
17 Mr. Hertzog said in 1946, but we don't, at this point in time,
18 in 2015, see that cross, or at least the inclusion of the cross
19 on the seal, as an endorsement of Christianity. But at this
20 point in time, after the passage of 71 years, we see that cross
21 as signifying just a part of the history of Lehigh County, just
22 as the other symbols alongside it clearly symbolize the history
23 of Lehigh County.

24 Now, that is -- there are two tests, of course, and I
25 think Mr. Schneider is correct -- there's no dispute --

1 THE COURT: So if there were no more farms in Lehigh
2 County --

3 MR. CAFFREY: Yes.

4 THE COURT: -- everything's gone industrialized, and
5 the county commissioners decided leave on the farms on the seal
6 as a representation of the history of the county, that's
7 somewhat similar to what you're suggesting they did with
8 respect to the cross. And it was challenged, said this was the
9 history of the county being represented on the seal, and the
10 history of the county included Christianity.

11 MR. CAFFREY: The history of the county included the
12 settlers of Lehigh County, who were Christian. That's the
13 historical reference to the cross. So, yes, farming is a part
14 of Lehigh County history, clothing manufacturing is a part of
15 Lehigh County history, the Liberty Bell having been hidden in
16 the Zion Church in Allentown is a part of Lehigh County
17 history. And I think, as is made clear in the Lynch case,
18 which is the nativity scene, that you can view an inherently
19 religious symbol along with other secular symbols in terms of
20 deciding the constitutionality of that particular display.

21 And in the Lynch case, which is not on all fours with
22 what we have here, Judge, but I think the principle is
23 applicable, and that is does the inclusion of clearly secular
24 symbols, along with an inherently religious symbol, perhaps
25 change the way that the reasonable person would look at that

1 display. So in the Lynch case, if you had only the nativity
2 scene, obviously it would be seen as clearly a religious
3 display. However, you include other secular symbols, the
4 person who views that display perhaps begins to look at it as
5 having a secular purpose and not simply a religious purpose.
6 And that, I think, is why it's applicable to an evaluation of
7 the county seal.

8 Now, Mr. Schneider indicated that the county and the
9 plaintiffs are essentially in agreement that the test to be
10 looked at, or the endorsement test -- or I should say the Lemon
11 test, as modified by the endorsement test -- with respect to
12 the endorsement test, it focuses, as you know, on how the
13 reasonable observer would perceive that religious display.
14 And, yes, a big part of the county's argument is that after 71
15 years, the reasonable observer would begin to see that cross
16 not simply as a religious symbol but as part of the history of
17 Lehigh County. But it's not just the passage of time. I think
18 it's also important to note that there's been no efforts by the
19 Lehigh County to point out to the public that there's a cross
20 on the flag. There's been no effort to celebrate the cross.

21 Now, while the seal is, in fact, as noted by
22 Mr. Schneider in many cases, in many locations in Lehigh
23 County, it's on the flag, it's on government buildings, it's on
24 letterhead and things of that nature, there's been no official
25 action taken to bring attention to the seal or to the cross on

1 the seal. So I think that's -- that was a big part of the
2 court's decision in Freethought as to why the Ten Commandments
3 would, after a period of 80 years, begin to take on a secular
4 purpose, at least in the mind of the reasonable observer.

5 Do you have any questions, Judge?

6 THE COURT: Yes, I do.

7 MR. CAFFREY: I thought you would.

8 THE COURT: It's really a question of the -- aren't
9 those symbols also part of the current value of the county, not
10 only history. Like isn't today's seal -- education, farming,
11 industry -- aren't all those part of the current values of the
12 county?

13 MR. CAFFREY: I believe you could say that, yes. I
14 don't believe that changes our argument, though, that they can
15 also be valued for their historical significance in the county
16 as well. Although some could argue that the industrial
17 buildings are hard to find --

18 THE COURT: Old? Or that there's --

19 MR. CAFFREY: -- at this point in time.

20 THE COURT: -- a lot of pollution coming out of
21 there.

22 MR. CAFFREY: Right. But I don't -- yes, those
23 elements are certainly present all the way down to the bison,
24 which is at the Lehigh County Game Preserve. But I don't think
25 that necessarily reflects -- changes the substance of my

1 argument.

2 THE COURT: Has there ever been any change to the
3 seal since 1944?

4 MR. CAFFREY: There's been no official changes to the
5 seal, but I can tell you Mr. Schneider went through different
6 versions of the seal with Mr. Osborne at his deposition, and
7 unofficially, there have been slight changes to the seal. The
8 reason for that is lost to history. I can tell you this,
9 though. If you look at the county website, where you see the
10 county seal very small at the top of the website, it obviously
11 will look different than it does on the county flag with the
12 blue background. It was changed in digital form for display
13 purposes that I can't explain. But there's been no official
14 changes to the seal. Slightly different variations to fit the
15 circumstance.

16 THE COURT: And I can't help but think that in 1944,
17 we're in the midst of World War II. Americans are dying in
18 large numbers, cemeteries being marked by crosses. It was a
19 unique time, I would think, for anybody that is in the process
20 of developing a seal, et cetera. I don't know if it would have
21 been different if it was before the war started or after the
22 war was over, but it was certainly a very unique time in
23 American history to be designing a seal to reflect the county.
24 But wouldn't you say that's part of the problem here, is this
25 seal today, in 2017, reflects the values of the county, and one

1 of them appears to be Christianity as a value of the community.

2 MR. CAFFREY: Well, I think that goes back to what I
3 said earlier, in that, look, we can't escape the fact that we
4 have a Latin cross on the seal. It's an inherently religious
5 symbol. Nothing that anyone is going to do is going to change
6 that. The question is, number one, how does a reasonable
7 observer look at that, knowing the age and history of the seal.
8 That's the endorsement test. And number two, what secular
9 purpose does the county have for refusing to remove that cross?
10 That's the purpose prong of the Lemon test. And again, even
11 though it's an inherently religious symbol, I think what the
12 record evidence discloses is that the County's reason for
13 refusing to remove that inherently religious symbol is not for
14 the purpose of endorsing religion.

15 THE COURT: Does it matter that, in 1944, the
16 reasonable observer looking at that cross would believe that
17 that cross was to represent Christianity because that's a value
18 of our community? In 2017, the importance of religion has
19 greatly diminished for many, many Lehigh County residents. And
20 the education of the average citizen as to what the government
21 can do and can't do as it relates to endorsing religion is
22 great. And most, if not all, people in Lehigh County know that
23 Lehigh County cannot endorse a religion. And if they know that
24 Lehigh County cannot endorse a religion, and the importance of
25 religion has diminished to such a degree, does that change what

1 the reasonable observer -- who the reasonable observer is in
2 2017 and what they would take from that cross being on the
3 seal?

4 MR. CAFFREY: I think it has to. I think the
5 reasonable person in 1944 is very different from the reasonable
6 person in 2015, when they refused to remove the seal. I don't
7 think there's any question about that. As you noted, I think
8 the reasonable person -- I think any person in 1944 who saw the
9 cross and who read Mr. Hertzog's article would understand that
10 they put the cross on the seal to honor Christianity, exactly
11 what's stated in the article.

12 THE COURT: Now, suppose at the opening of the
13 commissioners' meeting they decided to have an opening prayer.
14 Can they do it?

15 MR. CAFFREY: Well, we haven't received that
16 challenge yet, Judge, so I'm not quite prepared to argue that.
17 That's a little bit of a different analysis.

18 THE COURT: It's generally been accepted as being
19 permitted, and I'm sure Mr. Schneider would comment on that if
20 that's not precisely true. And I know that's not the focus
21 here, but there, you're actually calling out to God in a very
22 real way, and if that is constitutional, then it makes the
23 analysis of the seal a little different, where it's just a
24 passive symbol. Some would argue a passive symbol can be more
25 powerful than an act of prayer before the commissioners'

1 meeting or before the opening of the United States Congress.
2 But it demonstrates the difficulty in trying to apply these
3 principles to different things that have become part of the
4 history of this country, while at the same time not offending
5 the different groups that now exist, and existed then,
6 arguably.

7 MR. CAFFREY: Well, certainly, Judge, as you know,
8 this is not something I do on a daily basis. I deal with the
9 civil rights actions based upon law enforcement activities.
10 That's why I was here a few weeks ago. So when I looked at
11 these cases, it's a very interesting analysis. The Lemon test
12 has been criticized for 25, 30 years, but the Supreme Court
13 certainly hasn't seen fit to overrule it, choosing instead to
14 use the endorsement test, but still holding onto the secular
15 purpose prong of the Lemon test. And they give the district
16 courts a framework to work within, but each case, of course,
17 has its own set of facts unique to that particular case, which
18 is what we have here.

19 We don't have a lot of information, frankly, and it's
20 probably not all that different than seals or Ten Commandment
21 cases that have been around for decades. Probably in those
22 cases, there's not a lot of information either. But we do have
23 a lot of information on why the board of commissioners took the
24 action that it took in 2015, and again, I think that has to be
25 the focus of your attention here.

1 I'm not going to try to dispute what happened in
2 1944. I think that would be foolish, given the inherent
3 religious nature of the cross and given what Mr. Hertzog said
4 in his article. And again, if that was the sole focus of your
5 attention, Judge, then we'd probably lose this case hands-down.
6 But it should not be the focus of your attention.

7 THE COURT: Okay. Thank you very much, sir.

8 MR. CAFFREY: Okay. Thank you, Judge.

9 THE COURT: And Mr. Schneider, what do you think
10 about that idea of can the commissioners have an opening
11 prayer?

12 MR. SCHNEIDER: Your Honor, I wish I were more able
13 to comment on that. I know --

14 THE COURT: Well, we know in the U.S. House of
15 Representatives, they do, and in the Senate, they do.

16 MR. SCHNEIDER: Yes, and I know legislative prayer,
17 often different than prayer in other settings, like in a school
18 setting. Indian River, in the Third Circuit, dealt with prayer
19 in a school setting, and I think that's somewhat different.
20 And personally, I haven't encountered a legislative prayer
21 situation, Your Honor, to really be able to comment on that.
22 But I certainly acknowledge that the courts have treated
23 legislative prayer in a different way. I think given the long
24 history of the presence of some sort of wanting to present
25 legislative sessions as a solemn event and, you know, making

1 some expression in that regard, that it has been treated
2 differently.

3 THE COURT: Okay. And what about the reasonable
4 observer today versus the reasonable observer in 1944?
5 Americans know that the government cannot endorse a religion.
6 It certainly can't establish a religion or course. It can't
7 even endorse one religion over another. Now, that's the
8 mind-set of the reasonable observer today. Does that
9 reasonable observer look at the flag and say, that cross has to
10 go because Lehigh County is endorsing religion, or does the
11 reasonable observer now look at that and recognize that's just
12 a historical -- something left over from an earlier time? Does
13 it affect how we interpret the reasonable observer, the
14 objective standard?

15 MR. SCHNEIDER: I think I would agree with
16 Mr. Caffrey that it does, Your Honor. I mean, I do think that
17 there is likely a difference between a reasonable observer
18 today and a reasonable observer in 1944. Specifically what
19 those differences are, in terms of what the reasonable observer
20 brings to the table before considering these specific facts, I
21 think it would be probably a greater knowledge of, you know,
22 the meaning of the Establishment Clause and the Separation
23 Clause and -- but I think at the end of the day the most
24 important function of the reasonable observer is the
25 consideration of these facts through a lens of today, through a

1 lens of this time. And, you know, I think the lack of
2 evidence, the lack of a record to add any sort of clarifying
3 information about the meaning of the seal, given the overt
4 nature of the presence of such a singularly religious symbol, I
5 think actually hurts the county's position here because it
6 gives less color for the reasonable observer to change what
7 would be the most readily understood meaning of the cross and
8 the seal. And so I think that that is probably more a
9 hindrance than a help in this situation because of how clearly
10 symbolic of Christianity the seal is.

11 THE COURT: And plus, you could obviously argue that
12 it is cases such as this that raise the level of information to
13 the average American as to what a government can do and can't
14 do as it relates to endorsement of religion.

15 MR. SCHNEIDER: Certainly. And Freedom from Religion
16 Foundation would be happy to hear Your Honor make that remark
17 in the sense of acknowledging the importance of, you know, the
18 defense of the First Amendment and, in situations like this, to
19 raise that sort of awareness, you know, in an effort to really
20 help teach the public about the meaning of the living and
21 breathing Constitution, and how it can handle situations like
22 this over a span of 200 years and adapt to the situations of
23 today as it did then.

24 THE COURT: Mr. Caffrey.

25 MR. CAFFREY: Let me just say in response to that,

1 Judge, first of all, the reasonable observer, I've always been
2 fascinated by that concept of the reasonable man. If you go
3 back to "Prosser on Torts" in the first year in law school,
4 there was a -- I specifically remember a note explaining what
5 the reasonable man was. He's the man who goes home after work
6 and cuts the lawn in his short sleeves. I never really
7 understood what Prosser meant by that, but I do remember that
8 note.

9 In terms of deciding what the reasonable observer
10 would see here -- and I don't mean to be repetitive -- but what
11 we do know from the case law is that the reasonable observer
12 knows the age, knows the history, and knows the context of the
13 challenged display, and here, that reasonable observer would
14 know that that seal has been around for 71 years, at least as
15 far as 2015 is concerned. It's been around for 71 years. No
16 one during that 71-year period has raised any challenge to it.
17 That cross on the seal is displayed not by itself, albeit
18 prominently, but displayed along with 15 other clearly secular
19 symbols.

20 So that's what we know the reasonable observer would
21 see and he would know, and I submit that with that in mind, and
22 also in mind that the county has made no effort to specifically
23 point out to the public the presence of that cross on the seal,
24 with all that in mind, I think it's fair to conclude that the
25 reasonable observer would understand the purpose of that cross

1 on the seal in 2015 to be secular in nature.

2 THE COURT: Okay.

3 MR. CAFFREY: Thank you.

4 THE COURT: Anything else, Counsel?

5 MR. SCHNEIDER: Your Honor, if you have time, there
6 was a point I wanted to make.

7 THE COURT: Sure.

8 MR. SCHNEIDER: Not trying to get the last word, but
9 I --

10 THE COURT: No, absolutely, sir. This has all been
11 very helpful.

12 MR. SCHNEIDER: I want to -- I guess I want to call
13 attention to a little bit of what I perceive to be a slightly
14 loose use of the word "history" here. The idea that
15 Christianity has had a historic presence in the county, I
16 think, is something that can be discarded as obviously
17 unconstitutional. There's been an acknowledgment that if this
18 seal were adopted today, it would be unconstitutional or the
19 argument would be much more difficult to overcome. The County
20 could very easily adopt this seal today and point to the cross
21 as being an acknowledgment that Christianity had a historic
22 presence in the county. That's an argument that could be made
23 today.

24 And so I don't think, to the extent that Christianity
25 has had a historic presence in the county, I don't think that

1 does anything to secularize the use of this cross because I
2 don't think the County would defend that today they could adopt
3 this seal and say, well, we were placing the cross here because
4 Christianity has had a historic presence in the county. So
5 whether that was the intention in 1944 or that is the intention
6 now, I don't think that sort of history has a secularizing
7 effect and that that sort of history can allow for this display
8 to continue.

9 What I hear the argument being, fairly characterizing
10 it, is the history of this singular seal as a landmark of the
11 county, as some sort of historic landmark of the county. And
12 that's why I would just go back to the argument that I made
13 earlier, that I'm having a hard time picking up anything more
14 than the passage of time being argued here, and I think placing
15 the courts in a position of saying sort of what's the magic
16 number for when an unconstitutional seal sort of is
17 grandfathered in I think is what the courts have tried to avoid
18 in recognizing that the passage of time alone is not
19 sufficient. So I just wanted to distinguish between the
20 history of this seal as a singular seal as being an argument
21 that I think can fairly be made here, although I think the
22 courts have said that that argument alone doesn't suffice.

23 But that to the extent that there's an argument that
24 Christianity has some historic meaning in the county, I don't
25 think that's a secular meaning at all, and I don't think that

1 if there was an attempt to adopt a seal like this today, citing
2 a long-term presence of Christianity in the county, I don't
3 think that would be permissible. And so I just wanted to
4 distinguish between those two types of history, Your Honor.

5 THE COURT: Okay. No, no, I appreciate that. You
6 know, for some reason, I can't help but think about the analogy
7 to what is happening to the Civil War monuments in the South
8 right now, that as history has evolved, the figures that had
9 been revered for years and years and years suddenly, as a
10 result of the changing demographics, are now considered
11 anathema. They're actually tearing down -- Robert E. Lee is
12 being torn down and Stonewall Jackson, and I believe -- I
13 forget the other one that was coming down.

14 And here, I can see where the commissioners would be
15 opposed to the idea that they have to change their seal after
16 all of these years simply because the world has changed, that
17 they want to hold on to that historic symbol and perhaps the
18 values that were much stronger then than they are today,
19 although some would argue those values are just as strong today
20 for those that are very religious, et cetera. But it does seem
21 to have this whole evolving appreciation of just what the
22 Constitution means and what it doesn't mean and how far does it
23 go.

24 And I think this has been one of the areas where the
25 Supreme Court has stayed pretty much out. It would be nice if

1 they would have been a little more in, but same with the Third
2 Circuit.

3 MR. SCHNEIDER: And I think, Your Honor, that there
4 has consistently been a recognition by the courts that the
5 courts must tread carefully to not seemingly oppose religious
6 exercise in cases like this, which, you know, removal of a
7 cross after years may be perceived by -- I'm sure it would be
8 perceived by some in the community to be --

9 THE COURT: Anti-religious.

10 MR. SCHNEIDER: -- that sort of hostility towards
11 religion. But I think what's important is that there are --
12 I'm sure there are more inclusive ways for the county to
13 recognize and commemorate the history of the county than to
14 have such a striking symbol that is -- as demonstrated by the
15 individual plaintiffs in this case, has a very significant,
16 alienating effect for members of the community today. And I
17 think that there's a lot of room between having to change one
18 aspect of the seal and having the ability to commemorate the
19 history of the county be significantly offended.

20 And so I think that, you know, there is room to do
21 that, and there may well be room to honor the settlers of the
22 county in a way that doesn't use just a singularly religious
23 symbol to do that. And so the hope would be that, you know, if
24 the County were to have to redesign this seal, there's plenty
25 of options to do that in a way that doesn't significantly

1 frustrate the ability to honor the history of the county.

2 THE COURT: Now, do you believe in 1944, based on
3 existing jurisprudence, the commissioners believed this was
4 constitutional when they designed this and adopted this seal?

5 MR. SCHNEIDER: Well, Your Honor, I think that your
6 remarks about World War II at the time -- actually, one of the
7 plaintiffs made the same observation in her deposition.

8 Ms. Winkler said that she can relate to the fact that, at the
9 time, it may have sort of been a rallying symbol for the
10 country and the community. But, you know, to her, that doesn't
11 change things today and what it means to her and how it makes
12 her feel in a county that still uses that symbol today. And so
13 I think they would like to also think that the seal could be
14 adapted in a way that is more inclusive, you know, today.

15 THE COURT: Okay. Thank you very much, sir.

16 MR. SCHNEIDER: Thank you.

17 THE COURT: Mr. Caffrey, anything further?

18 MR. CAFFREY: Just one last thing.

19 THE COURT: Certainly.

20 MR. CAFFREY: I think, Judge, the cases make it clear
21 that the First Amendment doesn't require the removal of all
22 traces of religion.

23 THE COURT: Have you ever been down to the Supreme
24 Court chamber --

25 MR. CAFFREY: Exactly.

1 THE COURT: -- where they argue? And all around the
2 top are religious symbols.

3 MR. CAFFREY: Well, and again, the reference to "In
4 God We Trust" and "God save this honorable court," the
5 Constitution doesn't require all removal of traces and
6 references to God and religion. Clearly, it doesn't. So if,
7 as Mr. Schneider is suggesting, that the county's stated
8 purpose of honoring the original settlers of Lehigh County who
9 are Christian is still somewhat sectarian in nature -- and I'm
10 not conceding that, but to the effect that you assume it to be
11 true for purposes of argument -- that doesn't necessarily
12 invalidate our position and render the seal violative of the
13 First Amendment because the question again always comes down to
14 what is the purpose and effect. What was the purpose of
15 refusing to remove that seal? What is the effect on the
16 reasonable observer?

17 It's okay, just like in the nativity scene, that
18 there's a religious symbol there. You cannot change the fact
19 that a nativity scene is religious in nature. No matter what
20 you do, no matter what you put there, no matter what you say,
21 it's always going to be religious. But it's how the reasonable
22 observer perceives the government purpose in putting that
23 display together. It's how the purpose of the government, in
24 refusing to remove a display, is construed, all points that
25 we've covered in this argument.

1 THE COURT: And there's no question that there is a
2 much more powerful appreciation of religion, in particular,
3 Christianity, in 1944 than there is today.

4 MR. CAFFREY: Judge, first of all, we have the World
5 War II reference, which I think I valid. Secondly, I mean,
6 let's be honest, the population in Lehigh County in 1944 was
7 probably overwhelmingly Christian. No one batted an eye, I'm
8 sure, when a cross showed up on the county seal and one of the
9 county commissioners writes an article that says the purpose of
10 the cross is to honor Christianity. Nobody batted an eye
11 because your neighbor was Christian, someone down the street
12 was probably Christian. Not everyone, but let's face it, it
13 was probably overwhelmingly Christian. The demographics of the
14 county have clearly changed since then, which is why the focus
15 should be on now.

16 THE COURT: Even this idea of what the cross -- what
17 that symbol stands for -- if you go down to Arlington National
18 Cemetery and you see the crosses, now, you know that not
19 everybody under a cross was religious. They obviously were
20 Christian or they would have the Star of David or some other
21 symbol there, but there are waves and waves and waves of
22 crosses, and interspersed with the Star of David.

23 What does that cross mean above their grave? Does it
24 -- it means whatever it meant to them or whatever it means to
25 the observer, and the observer looks at it, we all know not all

1 are religious, but they're all identified. And I guess there
2 is this hope that if there is a greater being and if there is a
3 greater place, that they've all gone to that greater place.
4 You know, what does the observer think? Does he think this is
5 a Christian cemetery because we have all these Christian
6 crosses all over the field?

7 MR. CAFFREY: Well, it would be interesting to know
8 who decides what's placed there. Is it the government, which
9 has given permission for the soldier to be buried there, or is
10 it the family who makes the decision? I don't know the answer
11 to that.

12 THE COURT: I don't know. And are there any other
13 symbols, other than the cross or the Star of David? I don't
14 know that either.

15 MR. CAFFREY: Not that I'm aware of.

16 MR. SCHNEIDER: I'm not sure, Your Honor.

17 THE COURT: That's an interesting issue that'll have
18 to be dealt with in other court or by another court. Anything
19 further?

20 MR. CAFFREY: No, Judge.

21 MR. SCHNEIDER: I don't think so, Your Honor.

22 THE COURT: Just as your written submissions were
23 outstanding, this argument was also very, very helpful.

24 MR. CAFFREY: Thank you, Judge.

25 MR. SCHNEIDER: Thank Your Honor.

1 THE COURT: Thank you very much. Have a great rest
2 of the day.

3 MR. SCHNEIDER: Thank you.

4 MR. CAFFREY: You, too.

5 THE CLERK: All rise.

6 (Proceedings concluded at 10:33 a.m.)

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C E R T I F I C A T I O N

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16 I, Alicia Jarrett, court-approved transcriber, hereby
17 certify that the foregoing is a correct transcript from the
18 official electronic sound recording of the proceedings in the
19 above-entitled matter.

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Alicia J. Jarrett

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